

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARIA AUSTIN,  
Plaintiff,

v.

Civil Action No. 3:04-CV-56

JO ANNE B. BARNHART,  
COMMISSIONER OF  
SOCIAL SECURITY,

Defendant.

**MEMORANDUM, OPINION, and REPORT AND RECOMMENDATION THAT  
ACTION BE DISMISSED FOR FAILURE TO COMPLY WITH THE TIMELINESS  
REQUIREMENTS OF 42 U.S.C. § 405(g)**

On May 1, 2004 the Appeals Council denied Claimant's request for review. The *pro se* Claimant filed her complaint with this Court on July 7, 2004.<sup>1</sup> "Any individual, after any final decision of the Commissioner made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." 42 U.S.C. § 405(g). The Appeals Council sent Claimant notice of its denial on May 1, 2004. Allowing for five additional days for mailing, Claimant was required to commence a civil action by July 5, 2004. Claimant filed her Complaint on July 7, 2004. On April 8, 2005 the undersigned gave notified Claimant that her complaint was filed late in violation of 42 U.S.C. § 405(g) and was given thirty days to file any opposition explaining why her case should not be dismissed in accordance with Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975). As of May 31, 2005 Claimant has not filed any opposition explaining why her case should not be dismissed.

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<sup>1</sup> Docket No. 1.

Therefore, it is recommended this action be **DISMISSED**.

Any party who appears *pro se* and any counsel of record, as applicable, may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should be filed with the District Court Judge of Record. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation.

The Clerk of the Court is directed to mail a copy of this Report and Recommendation to parties who appear *pro se* and any counsel of record, as applicable.

DATED: May 31, 2005

/s/ James E. Seibert  
JAMES E. SEIBERT  
UNITED STATES MAGISTRATE JUDGE